EXHIBIT M

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

SIA HENRY, et al.,	)	Docket No. 22 C 125
Plaintiffs,	)	
vs.	)	
BROWN UNIVERSITY, et al.,	)	Chicago, Illinois
	)	September 2, 2022
Defendants.	)	9:25 o'clock a.m.

TRANSCRIPT OF PROCEEDINGS
BEFORE THE HONORABLE MATTHEW F. KENNELLY

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(The following proceedings were had telephonically:)

THE CLERK: Case 22 C 125, Henry v. Brown University.

THE COURT: Okay. So this is the way we're going to do this. My guess is I probably got about 30 people on the phone for this case. If I go through all of those 30 names, it's going to take most of the time I have to talk about this, so we're not going to do that.

What I'm going to ask -- I'm going to appoint one person on each side to kind of be the coordinator, and what you're going to do is you're going to get a list to my courtroom deputy clerk who is going to give it to the court reporter by noon Chicago time today identifying all of the people who are on the call for the plaintiffs and for each of the defendants. So who wants to be the volunteer for the plaintiff?

MS. FEGAN: Your Honor, this is Beth Fegan.

THE COURT: There was --

MS. FEGAN: This is Beth Fegan. I'm happy to do that.

THE COURT: Ms. Fegan is the volunteer for the plaintiff.

I don't want to ask who the volunteer is for the defendant, so I'm going to narrow it down. Let's say it's going to be somebody from Chicago whose last name starts with the letter A through M. If there's anybody that meets -- and

that's arbitrary. Let me just be clear about it. If there's somebody that meets that criteria who wants to volunteer to be the person that everybody who is on the phone sends you their email that they were on the phone so you can compile a list and give it to my courtroom deputy clerk, please speak up.

MS. MILLER: Good morning, your Honor. Britt Miller from Mayer Brown. The defendants sent a list this morning to both the court reporter and to your clerk, so they should already have them.

THE COURT: You're way ahead of me. Thank you very much.

MS. MILLER: You're welcome, your Honor.

THE COURT: Then the protocol from here on in is that if you're speaking, just say who you are.

Anytime a 33-page status report comes in not counting the attachments, that's kind of a bad sign. I'll just preface this by saying that.

But I think this is -- you know, it's a few discrete issues that have to be dealt with here. And I just want to hear really briefly by one person from each side -- and you've both given me your takes on this issue. So the main point of contention, if you will, in terms of the scheduling has to do with whether experts are going to be done in kind of two phases, class-related experts and I guess everything else related experts, merits experts, which is essentially the

defendants' proposal, or whether they're going to be done at the same time, which is essentially the plaintiffs' proposal. And there's brief discussions about pros and cons in the status report, but I'd like to hear a little bit more about that.

So plaintiff, whoever wants to talk about that on the plaintiffs' side, go ahead.

MR. CRAMER: Thank you, your Honor. Eric Cramer for the plaintiffs. In the papers we cited to your Honor, several courts have eliminated schedules with two rounds of expert reports.

THE COURT: It's going to be much better if you talk about what it is about this case, okay, as opposed to why Judge Durkin in the broiler chicken case did something or whether Judge Wood in the whatever case did something. Talk about this case, why what you're saying makes sense for this case.

MR. CRAMER: Yes, your Honor. Understood.

In our experience in class action juris prudence and this case in particular, what plaintiffs will be doing -- what plaintiffs' experts will be doing at class certification under the modern juris prudence of class actions is to produce reliable predominantly class-wide methods capable of proving their case at trial, and the best way to show a plaintiff has a reliable method capable of proving a case at trial is to

perform those methods. To be conservative, what plaintiffs' case reports are in this case in an antitrust class action are effectively merits reports.

Now, defendants argue that class action is a threshold issue that should be undertaken before what they call full-blown merits discovery. Let me make some brief points about that.

First, defendants are already conceding that the class expert exchange only comes after all of fact discovery has been completed. So in no sense is class certification in this case going to be a threshold issue any more than summary judgment is.

Now, defendants are certainly correct that plaintiffs do not need to prove, say, a relevant market or that defendant in fact conspired in order for us to win class certification, but plaintiffs have the burden of showing that common issues will predominate at trial. Again, making that showing, the plaintiffs' experts inevitably will need to demonstrate they can and will use common methods capable of demonstrating a relevant market, capable of demonstrating defendants' collective market power, and that defendants' conduct is consistent with collusion to reduce financial aid and inconsistent with competition. Defendants' experts at the class stage in this case will respond on those issues. The only question is whether the parties are going to do this once

or twice, spending millions of dollars extra on experts in the process of running the expert exchange a second time.

As a practical matter in my experience what the second round does is provide essentially a mult-round expert battle with the class report being the first volley and then the so-called merits reports serving as sur and surrebuttal, and it just -- the plaintiffs' model will be put forward on class, defendants will attack it, plaintiffs will respond. Plaintiffs will adjust their model to take account of any of defendants' criticisms. And then at the merits stage, we'll go through that same process again.

And the biggest part of the class certification battle is going to be about plaintiffs' model for showing class-wide impact and damages. That's going to comprise 80 percent of the class debate and it's going to comprise 80 percent of the merits debate, and we're going to run and do it twice under defendants' proposal.

And the last point I make on this is that the costs are going to be really high. It's going to cost the plaintiffs and the defendants millions of dollars extra. We're going to get four reports from the plaintiffs' experts, two depositions of each expert, and it's also going to take a lot of extra time. Defendants don't spell it out, but it's going to add at least six to eight months because we're going to have to after class certification, run plaintiffs' report,

defendants' report, plaintiffs' rebuttal, and then a second round of Daubert motions for the Court, so it's going to add six to eight months.

THE COURT: You've told me enough. Stop. Time out. Thanks.

Let me hear from somebody on the defendants' side. Give me the points for your position.

MS. MILLER: Good morning, your Honor. Britt Miller again on behalf of Georgetown, and I'll be speaking on behalf of the defendants.

Specifically with respect to this case, your Honor, as well as antitrust cases generally, we think it makes sense to bifurcate in a way that we have suggested. We have suggested that for class certification, all of the expert reports be done in advance of briefing so that there is only one round of class certification briefing and class certification Daubert briefing so as to achieve some of the efficiencies that Mr. Cramer discusses, but we do not think that the two inquiries are completely overlapping.

Yes, there certainly is some overlap, and if Mr. Cramer wants to submit one round of class certification reports and have those stand as his expert reports on merits, that's his option; but we believe we will be having different experts addressing somewhat related but different topics and that, frankly, the defendants or the plaintiffs should not be

required to incur substantial costs on the merits side of the case until -- unless and until class certification has been resolved and the case is in fact proceeding as a class.

If the defendants prevail at class certification, then some of the merits, if not all of the merits work, including all of the costs and the depositions, will not be incurred. This should be focused -- very focused on class certification issues which are to be addressed to your Honor with experts. The experts will be deposed once on their expert report opinions. They will not be deposed again on their expert report for class certification. Only if we get to merits reports will they actually be deposed again.

This is the most efficient way to do it in this case, particularly given a lot of the individualized nature of the damages claims that are going to be existing in this case such that we think it's the more efficient approach than trying to do it all at once and sorting it out on the backside.

THE COURT: Well, this is one of those questions that I don't think there is necessarily a right answer to it. Part of what I have to take into account is what the overall schedule looks like.

The problem that I have with the defense schedule and the proposal as it relates to the schedule is it basically has us two years out from having the class certification briefing done -- you know, obviously some period of time is involved,

so we're into -- we're significantly -- we're pretty close to the end of 2024 before you would even start the merits expert discovery. And, you know, if we're doing a two-stage procedure like that, that's likely to take a significant amount of time as well.

And so we're now -- there's a reasonably good chance we'd be all the way through the end of 2025 before we even finish that, and then summary judgment briefing would be 2026, and it makes my head hurt to kind of think about scheduling things through 2026 at this point.

I mean, I certainly agree with one of the things that Ms. Miller said at the top of her presentation which is that there's not going to be complete overlap between the two, but I don't really think that's the issue. I think it's extremely likely that there's going to be very, very significant overlap between what you would refer to as class experts and what you would refer to as merits experts, and so for that reason, I think although there's extra costs that are going to be imposed, I think on balance, plaintiffs' proposal makes more sense, so that's the one I'm going to go with.

I do want to add one thing. So there's a suggestion in the defendants' submission that the deadline that the plaintiffs have proposed for amending the pleadings and adding parties is an extended deadline. It's a long deadline. It's July the 31st of next year, and I think in a case of this

scope, that's not a particularly long deadline. It's only nine months from now or 11 months from now maybe, 10 and a half.

The second thing is that another -- presumably when the defendants put together their proposal that was, you know, you have to do these things in a way you're going to be able to sell it, and it wouldn't be surprising for a judge in my position to raise some concerns about the overall length, so part of the way it looks like that was dealt with was to set a fact discovery cutoff date that in my estimation is just not reasonable for a case of this potential magnitude. It's a year from now. So those are some of the problems with it.

So I'm going to go with the plaintiffs' proposal on this.

The issues about depositions, I mean, I don't think I have to make a final decision on this today. I think there's some value in maybe making some general comments about that and then tabling it until there's a better sense of -- you know, maybe four or five months from now about the scope of potentially likely witnesses.

I will say that limiting each side to 75 depositions inclusive of non-party depositions and that no individual defendant will be subject to more than five depositions of which no more than one may be a rule 30(b)(6) deposition, which is the defendants' proposal, is somewhere between absurd

and insane. And so that's kind of a no-sale.

I'm not necessarily persuaded at this point that the plaintiffs need 15 depositions per defendant. I think that might depend on some things, and that's why I'm not really interested in making a final resolution of that right now. And that seems to be really the only other thing that I was being asked to decide upon at this point is the number of depositions. So I'm going to say I'm going to leave that for further discussion, and you have a general sense of what the parameters are on each side.

On interrogatories, I'm just going to say, you know, 25 is not enough, 65 is too many. So agree on a number somewhere in between those. Ditto on requests to admit.

I mean, in a case like this -- well, in all likelihood, requests to admit are going to be largely involving things like authenticating documents is my guess.

So you've heard what I have to say. What I need you to do is put together now an order which takes the plaintiffs' schedule. If you need to tweak anything in there based on the discussion today, go ahead and tweak it. You can put a paragraph in -- we'll call it a case management order or something like that. You can put a paragraph in there about depositions and that's going to be addressed at a later point in time.

I think my goal would be to have folks submit let's

say right around the end of the year, because you're not going to be in depositions before that or anywhere close to before that, I guess, some more specific concrete proposals that are based a little bit more on what you're actually seeing in terms of scope of document production and whatnot, and I'll address it at that point.

So I want a status report from you in two months just to -- I want this draft order within -- by next Wednesday, so that's the 7th. I need a Word version sent to my proposed order email address.

I want a status report regarding discovery from you in two months. We'll just call that the 7th of November.

I'm going to tentatively set it for another status on the 14th of November at 8:45 by phone. There's a good chance I'll vacate that if it looks like things are moving along okay.

Then I want a deadline for a joint report with a proposal for deposition numbers is going to be let's say the 23rd of December, which we'll use kind of as a surrogate for the end of the year. I'll worry about setting another status date after that.

MS. MILLER: I'm sorry, your Honor. I didn't hear that last date. Could you repeat that?

THE COURT: 23rd of December.

The one other thing that's in there is, you know,

discussions about a mediator, and it's not surprising at this point plaintiffs say a mediator should get going right away. Defendants say there's no merit to the case, why should we do that. I'm going to tell you what my view is about this, and, you know, again, this is one of these things that there's no right answer to.

I don't think it would -- I don't think it would hurt for folks to sit down with a mediator at some early point in the case. I don't mean right now. I don't mean a month from now. I mean at some early point in the case before, you know, bazillions of dollars get spent on each side, because you don't know that the case can't be resolved in a way that's acceptable until you make some effort to do that.

Now, whether you use a private mediator, you know, of which there are many good ones -- there's four or five former judges of this court who are in that business right now, plenty of other people all over the place, all of whom have a lot of skill and expertise in complex cases -- or whether I appoint somebody, which I'd be happy to do, if and when I think it makes sense, which is not at this moment, I can absolutely -- I have a couple of ideas that I would throw out at that point in time.

So I guess what I'd like you to do is give that some more thought, and, you know, you could say, well, why should we do this, it's going to be expensive. So, like, everything

in this case is going to be expensive. The thing that's going to be the most expensive is the document and production and document review, depositions, and the experts, and that's all stuff that's in the future. If there were some way of you all reaching some reasonable accommodation before you got to that point, you know, you'd be spending money to get that, but it would probably be money well spent.

I'd like you all to think about that, do some discussing about it and include something about that in the November whatever date I give you -- November 7 status report, as well about the idea of either appointing a special master I guess what you'd have to call it if it was appointed by me, or going to mediation. Just food for thought.

Now I'm going to gird my loins and say, is there anything else anybody wants to bring up today?

MR. CRAMER: Nothing from the plaintiffs, your Honor. Thank you.

MS. MILLER: Nothing from the defendants, your Honor.

THE COURT: Wow. I thought for sure I'd have at least 15 things there.

Take care. Everybody have a nice day.

(Which were all the proceedings had in the above-entitled cause on the day and date aforesaid.)

I certify that the foregoing is a correct transcript from the record of proceedings in the above-entitled matter.

_____ _____

Carolyn R. Cox Date
Official Court Reporter
Northern District of Illinois
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